

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

GERALD E. HENKE, SR.	§	PLAINTIFF
	§	
v.	§	Civil Action No. 1:07CV1216-LG-RHW
	§	
DONALD C. WINTER, Secretary of the Department of the Navy	§	DEFENDANT
	§	

**MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANT’S MOTION TO DISMISS**

BEFORE THE COURT is the Motion to Dismiss [6] filed by Defendant Donald C. Winter, Secretary of the Department of the Navy. Plaintiff has responded to the Motion, and the Navy has replied. In his complaint, Plaintiff alleges gender discrimination under Title VII, age discrimination under the Age Discrimination in Employment Act (“ADEA”), and disability discrimination under the Americans with Disabilities Act (“ADA”). Construing Plaintiff’s complaint liberally, it also appears that he is asserting a race discrimination claim under to 42 U.S.C. § 1981. Upon reviewing the submissions of the parties and applicable law, the Court finds that Plaintiff’s gender discrimination, age discrimination, and disability discrimination claims are time-barred and should therefore be dismissed.

FACTS

Plaintiff filed a Formal Complaint of Discrimination with the Navy on May 3, 2006. The Formal Complaint was accepted on May 10, 2006. (Ex. A & B to Def.’s Mot.) Plaintiff requested a hearing, but the Administrative Law Judge returned the case to the Navy for a final decision due to Plaintiff’s failure to comply with an administrative order. (Ex. C to Def.’s Mot.) On March 10, 2007, the Navy issued its final decision, determining that Plaintiff was not subjected to unlawful discrimination. (Ex. D to Def.’s Mot.) The final decision notified Plaintiff

that he was permitted to bring a claim in federal court within 90 days of receipt of the final decision. (*Id.* at 4) Plaintiff's attorney received the final decision on August 14, 2007. (Ex. E to Def.'s Mot.) Plaintiff received a copy of the final decision on August 26, 2007.¹ (*Id.*) On November 20, 2007, Plaintiff filed his discrimination lawsuit against the United States Department of the Navy.

Discussion

Actions brought pursuant to Title VII, the ADEA, and the ADA must be filed within 90 days of receipt of a final agency decision. 42 U.S.C. §§ 2000e-16(c), 12117; *St. Louis v. Tex. Worker's Comp. Comm'n*, 65 F.3d 43 (5th Cir. 1995). This requirement applies to receipt by the employee or his attorney. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92-93 (1990). The lawsuit must be filed within ninety days of the date on which the employee's attorney received the final decision, if the attorney received the decision first. *Irwin*, 498 U.S. at 92-93.

In this case, it is undisputed that Plaintiff's attorney received the final agency decision on August 14, 2007. Plaintiff's complaint was filed 98 days later. There being no allegation or showing of equitable tolling, Plaintiff's Title VII, ADEA, and ADA claims must be dismissed.²

¹The date on which Plaintiff personally received the final decision is disputed by the parties because the return signed by Plaintiff is not dated. (See Ex. F to Def.'s Mot.) Plaintiff has produced a copy of the envelope containing the final decision that he received, which contains a postmark of August 10, 2007. (Ex. A to Pl.'s Resp.) The envelope appears to provide that a first attempt to deliver the final decision was made on August 14, 2007. The envelope also states: "2nd Notice 8/16" and "Return 8/26."

² As explained previously, it appears that Plaintiff has attempted to bring a race discrimination claim pursuant to 42 U.S.C. § 1981. The 90 day time limitation does not apply to §1981 claims. *See Scarlett v. Seaboard Coast Line R.R. Co.*, 676 F.2d 1043, 1050-51 (5th Cir. 1982). Additionally, Defendant has not sought dismissal of that claim. Therefore, Plaintiff's 42 U.S.C. § 1981 claim remains pending before this Court.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion to Dismiss [6] is **GRANTED**. Plaintiff's Title VII, ADEA, and ADA claims are dismissed.

SO ORDERED AND ADJUDGED this the 9th day of April, 2008.

s/ *Louis Guirola, Jr.*
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE